

**SUPREME COURT OF FLORIDA**

**CARRINGTON PLACE of  
ST. PETERSBURG, LLC, et al.,**

**Petitioners,**

**v.**

**CASE NO.: SC09-1152  
2d DCA CASE NO.: 2d08-2797**

**THE ESTATE OF JENNIE MILO,  
by and through ANNETTE BRITTO  
a/k/a ANTOINETTE MARY BRITTO,  
Personal Representative,**

**Respondent.**

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**RESPONDENT'S BRIEF ON JURISDICTION**

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## **STATEMENT OF THE CASE AND FACTS**

Respondent adopts and incorporates the Statement of the Case and Facts contained in Petitioners' Jurisdictional Brief.

## **STATEMENT OF JURISDICTION**

Although this Court has jurisdiction pursuant to Article V, section 3 of the Florida Constitution, to consider the parties' Jurisdictional Briefs, the Court lacks subject matter jurisdiction to accept this matter for discretionary review, because the decision in *Carrington Place of St. Petersburg, LLC v. The Estate of Jennie Milo* ("Milo") does not expressly and directly conflict with any other decision of this Court or of any other district court of appeal. *Reaves v. State*, 485 So.2d 829, 830(Fla. 1986).

## **SUMMARY OF THE ARGUMENT**

This Court lacks subject matter jurisdiction to review the Second District's March 25, 2009, opinion in *Milo*, because the decision is not in express and direct conflict with any opinion from another district or from this Court.

Petitioners erroneously assert that *Milo* is in conflict with "numerous decisions of the other district courts" on the issue of the enforceability of an arbitration agreement against a non-signatory who has performed under the agreement. However, a close review of the *Milo* opinion makes clear that the Second District never even addressed that particular issue in its opinion. Indeed,

the issue was never even asserted or raised by the Petitioner in support of its arbitration motion either in the lower court, or in its appellate briefs to the Second District. The sole issue before the Second District in *Milo* was whether Ms. Milo's durable family power of attorney ("POA") was broad enough to authorize Ms. Milo's attorney-in-fact to bind Ms. Milo to arbitration. The Panel scrutinized the terms of the POA and concluded that it was not, as the instrument specifically granted the attorney-in-fact authority only over Ms. Milo's property rights. There is no mention whatsoever in the opinion of any alternate ground by which to bind Ms. Milo to arbitrate. Thus, it cannot be said that *Milo* is in any conflict whatsoever with the authorities cited by Petitioners, much less that the decision is in *express* and *direct conflict*, as is required to be shown to invoke this Court's discretionary conflicts jurisdiction. Accordingly, Petitioners' request for discretionary review must be denied.

## **ARGUMENT**

### **I. THIS COURT LACKS SUBJECT MATTER JURISDICTION TO REVIEW THE *MILO* DECISION, BECAUSE THE OPINION IS NOT IN EXPRESS AND DIRECT CONFLICT WITH ANY OTHER DECISION OF THIS COURT OR OF ANOTHER DISTRICT.**

Petitioners fail to demonstrate the fundamental prerequisites for the Supreme Court to accept jurisdiction. While the Florida Constitution grants this Court discretionary jurisdiction to review conflicting decisions of district courts of

appeal, this jurisdiction need not and should not be invoked when no direct, express conflict exists. Fla. Const. Art. V, §3(b)(3); *Reaves v. State*, 485 So.2d 829, 830(Fla. 1986). The test to invoke jurisdiction under Article V, section 3(b)(3) of the Florida Constitution is not whether the Supreme Court would arrive at a different result or whether, as Petitioners suggest, to avoid confusion and clogging the district courts, but whether the district court's decision, on its face, so collides with a Supreme Court decision or a decision of another district on the same point of law so as to create a conflict among precedents. *Kincaid v. World Ins. Co.*, 157 So.2d 517 (Fla. 1963).

This Court has the authority to resolve legal conflicts created by the district courts of appeal pursuant to Article V, section 3(b)(3) of the Florida Constitution, which enables the Court to review a decision of a district court that expressly and directly conflicts with a decision of another district court of appeal or of this Court on the same question of law. This grant of discretionary jurisdiction in Article V, section 3(b)(3) is restated in Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

In *The Florida Star v. B.J.F.*, 530 So.2d 286, 288 (Fla. 1988), the Court explained that Article V, section 3(b)(3) creates and defines two concepts. The first of these is a general grant of discretionary subject matter jurisdiction, and the second is a constitutional command as to how the discretion itself may be

exercised. Before the 1980 constitutional revision of Article V, the Court had a broad constitutional power to entertain “conflict certiorari” petitions, but the 1980 revision deleted all references to the term “certiorari,” and drastically restricted the types of district court decisions that could be reviewed by the Florida Supreme Court on the basis of a conflict.

This Court has conflicts jurisdiction under the current provision in Article V only if the decision of the district court to be reviewed *expressly* and *directly* conflicts with a decision of the Supreme Court or that of another district. *The Florida Star* Court explained that by definition, the term “expressly” requires some written representation or expression of the legal grounds supporting the decision under review. A district court decision is not reviewable on the ground that an examination of the record would show that it is in conflict with another appellate decision; it is only reviewable if the conflict can be demonstrated from the *language* of the district court's opinion, which language “expressly addresses a question of law within the four corners of the opinion itself.” *Id.*

As previously noted by this Court in *Jenkins v. Florida* 385 So.2d 1356 (Fla. 1980), inclusion of the word ‘expressly’ into section 3(b)(3) mandates that the actual verbiage of the decision’s holdings must be in direct conflict with another decision.

The pertinent language of section 3(b)(3), as amended April 1, 1980,



leaves no room for doubt. This Court may only review a decision of a district court of appeal that expressly and directly conflicts with a decision of another district court of appeal or the Supreme Court on the same question of law. The dictionary definitions of the term “express” include: “to represent in words”; “to give expression to.” “Expressly” is defined: “in an express manner.” Webster's Third New International Dictionary, (1961 ed. unabr.).

Nor can a question of first impression be reviewed by this Court, as it cannot be said to be in conflict with another district court decision.

“[A] question of first impression by definition does not **conflict** with other decisions; unless the issue happens to involve constitutionality, constitutional interpretation, or a class of constitutional or state officers, the supreme court cannot on its own. . . . grant **discretionary** review. . . . Regardless of the significance of the legal issue, the supreme court may not grant **discretionary** review unless the case falls into one of the four categorical pigeonholes or unless the district court of appeal has granted permission. . . .”

*Bunkley v. State*, 882 So.2d 890, 904 (Fla. 2004).

Stated simply, the *Milo* decision, which solely ruled upon the limited scope of Ms. Milo’s POA (which the Court concluded did not authorize her attorney-in-fact to bind Ms. Milo to arbitrate her nursing home neglect claims) does not in any way conflict with the authorities cited by Petitioners. Each of the decisions cited in Petitioners’ Jurisdictional Brief dealt with the issue of whether a non-signatory could be bound to a contract by reason of such party’s partial or full performance thereunder. That issue was neither addressed in the *Milo* opinion, nor raised by the Petitioners in the trial court or

in their appeal to the Second District. Accordingly, their instant petition for review must be denied for lack of subject matter jurisdiction.

**II. THIS COURT’S DISCRETIONARY JURISDICTION CANNOT BE INVOKED IN AN EFFORT TO ‘ESTABLISH A FRAMEWORK’ FOR DECIDING IF A POA IS SUFFICIENTLY BROAD TO CONFER AUTHORITY TO BIND A NURSING HOME RESIDENT TO ARBITRATE.**

Petitioners alternatively argue that this Court should accept their case for discretionary review so as to reconcile the issue of how broad the terms of a POA need to be in order to confer upon the attorney-in-fact the authority to bind the principal to an agreement to arbitrate.

Petitioners cite to numerous opinions in which district courts have construed POAs in such a manner that, in some cases, the POAs were determined to confer authority to consent to arbitration, and in other cases the POAs were determined to be too narrow to authorize such a power. However, none of these cases are in express and direct conflict with *Milo* on any *point of law* set forth in the express language of the *Milo* opinion. Indeed, the cases cited by Petitioners in their Jurisdictional Brief at pages 7 through 9, merely point to the obvious fact that in each case, the district court strictly and narrowly interpreted the POA at issue by analyzing the scope and breadth of the grants of power expressed in the particular instrument before the court. Because each POA instrument was different, the result in each case was not “disparate,” as suggested by Petitioners, but rather was

driven by the unique provisions of the POA before the court in each case. Thus, each of the cases cited by Petitioners is factually distinguishable from *Milo*, and because they are not in express and direct conflict with the *Milo* opinion, they cannot be relied upon to invoke this Court's discretionary jurisdiction under Article V, section 3 (b) (3), and Rule 9.030(a)(2)(A)(iv) of the Florida Rules of Appellate Procedure.

### **CONCLUSION**

The *Milo* decision does not collide with either an opinion of this Court or of any other district court on the same point of law so as to create a conflict among precedents. Thus, this Court lacks subject matter jurisdiction to accept this matter for review. Accordingly, Petitioners' request for conflicts review must be denied.

### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above has been sent by ☐ Hand Delivery ☐ Facsimile ☒ U.S. Mail to: **Mara B. Levy, Esquire** and **Mark B. Hartig, Esquire**; McCumber, , Daniels, Buntz, et al., One Urban Centre, 4830 W. Kennedy Blvd., Suite 300, Tampa, FL 33609, this 10th day of August, 2009.

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**CERTIFICATE OF COMPLIANCE**

**I HEREBY CERTIFY** that the foregoing complies with the Florida Rules of Appellate Procedure 9.210 requiring the font size of the type herein to be at least fourteen points if in Times New Roman format.

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